Filed 6/1/10 Jackson v. Hackman CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RALPH JACKSON et al., Plaintiffs and Appellants, v. MICHAEL HACKMAN et al., Defendants and Respondents.	B210156 c/w B213532 (Los Angeles County Super. Ct. No. BC353132)

APPEALS from two separate summary judgments of the Superior Court of Los Angeles County, James A. Kaddo, Judge. One judgment affirmed; one judgment reversed, and remanded with directions.

Locke Lord Bissell & Liddell, Cozen O'Connor, Erik L. Jackson and Charles E. Wheeler for Plaintiffs and Appellants.

Law Offices of Julian A. Pollok and Julian A. Pollok for Defendant and Respondent Martin G. Leffler.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Kenneth C. Feldman for Defendants and Respondents Michael Hackman and Lewitt, Hackman, Shapiro, Marshall & Harlan.

____

The consolidated appeals addressed in this opinion arise from an action involving a forfeited investment in a failed effort by a limited liability company (LLC) to purchase a parcel of real property. Plaintiffs have sued to recover money paid into a nonrefundable escrow at the behest of the purchaser, plus punitive damages, based on nearly 20 causes of action predominantly sounding in claims of fraud and concealment of facts against the LLC, and the individual members of the LLC. The consolidated appeals are taken from two separate summary judgments, the first entered in favor of an attorney who provided legal services for the LLC, and the second in favor of a managing member of the LLC. We affirm the judgment in favor of the attorney. We reverse the judgment in favor of the managing member of the LLC, and remand the cause to the trial court with directions to vacate its order granting the managing member's motion for summary judgment, and to enter a new and different order denying the motion for summary judgment, and granting summary adjudication of specified causes of action.

FACTS

The Parties

In order to make the facts of this somewhat complicated case more readily discernable, a brief overview of the parties and their roles is helpful. They include:

Plaintiffs Ralph and Jane Jackson: They deposited $1 million into a nonrefundable escrow which had been opened for the LLC's purchase of a parcel of real property in the City of Redondo Beach.

Defendant Oscar Katz: His family trust was the majority member of the LLC that unsuccessfully attempted to purchase the Redondo Beach property.

Defendant Keith Taylor: He was a member of the LLC. He also happened to be the Jacksons' "trusted" financial consultant, and was instrumental in persuading them to make their investment.

Defendant Martin Leffler: He was another member of the LLC, and Katz's long-time accountant.

Defendant Michael Hackman: He provided legal services for the LLC.

The current appeal involves the Jacksons' claims against defendants Leffler and Hackman.

The Early History of the Property Dealings

At some point prior to the spring of 2001, Oscar Katz, through or in connection with the Katz Family Trust, caused a limited liability company by the name of NewXarts, LLC to be formed for the purpose of acquiring, owning and developing a parcel of real property located at 1700 Pacific Coast Highway in Redondo Beach. At that time, the Redondo property was owned by an entity known as 88 Palos Verdes Inn, Ltd., not a party to the current consolidated appeals. In March 2001, NewXarts and 88 Palos Verdes entered into an agreement for the sale of the Redondo property. However, the sale it contemplated was terminated when NewXarts failed to deposit $100,000 into escrow within 14 days as required. Other than setting a foundational background, the original purchase and sale agreement is not relevant to this case.

In June 2001, NewXarts (by Barbara Bierman, "individually and as a co-Trustee of the Katz Family Trust") and 88 Palos Verdes tried again, this time executing a written contract entitled "First Amended and Restated Agreement of Purchase and Sale of Real Property and Escrow Instructions" (FAPSA) for the Redondo property. The purchase price for the property under the terms of the FAPSA was $19.48 million. 88 Palos Verdes and NewXarts amended the terms of the FAPSA several times over the following years, and the sale of the property remained unclosed. At some point in time, NewXarts deposited $1,008,000 into escrow to extend the closing date for the sale into 2005.

Martin Leffler, Keith Taylor, Michael Hackman, and NXA

Martin Leffler, a certified public accountant, provided accounting services for Oscar Katz and the Katz Family Trust from the late 1980s or early 1990s, through some time about 2007. During the same time frame, Leffler and two other accountants -- Michael Miller and Jerome Ward -- formed a professional accounting firm known as Leffler, Miller and Ward (LMW). Over time, Katz came to owe LMW more than $200,000 for accounting services. In 2004, Katz and Leffler began to talk about the latter becoming involved in the former's venture to purchase and develop the Redondo Beach property as a means to the end of providing Katz with the money to pay off his debt to LMW. At roughly the same time, Leffler happened to play a round of golf with Keith Taylor, and began talking to him about the venture as well. Taylor agreed to become involved.

Taylor and his controlled corporation, Quantum Capital Partners, Inc., had been the Jackson's trusted financial advisers for several years. In April 2005, Oscar Katz and Keith Taylor met with Plaintiff Ralph Jackson to discuss his possible involvement in the purchase and development of the Redondo Beach property. During the meeting, Taylor and Katz represented to Jackson that the Redondo Beach property was worth much more than the purchase price. They asked him whether he might be interested in becoming involved in a joint venture to develop a condominium project on the property. Jackson told Taylor and Katz that he was not interested in such a venture, but that, if they were interested in "flipping" the property, Jackson's son was commercial real estate broker who could determine the market value for them. After the April 2005 meeting, Katz and Taylor appear to have placed plans of dealing with Jackson on hold, at least for a time.

Attorney Michael Hackman[1] began providing legal services for Oscar Katz and his related entities sometime around 1990, but he did not become interested in the purchase of the Redondo Beach property until after NewXarts had already been formed in 2001 for that purpose. Sometime around the spring of 2005, Katz retained Hackman to form a new limited liability company — nXa, LLC — to assume NewXarts's existing liabilities and obligations, and as the buyer of the Redondo Beach property.

At some point in time, Keith Taylor and Martin Leffler became the ostensible trustees of the Katz Family Trust. Effective July 1, 2005, Keith Taylor and Martin Leffler, as Trustees of the Katz Family Trust, and Keith Taylor, Martin Leffler, Michael Miller and Jerome Ward, in their individual capacities, entered a "Manager-Managed

---

[1] Our references to Hackman include his law firm, Lewitt, Hackman, Shapiro, Marshall & Harlan.

Operating Agreement," prepared by attorney Hackman, creating a limited liability company by the name nXa, LLC (NXA). Under the terms of NXA's Operating Agreement, the members of NXA, and their stated interests in the company, were established as follows:

(1) the Katz Family Trust	(90%);
(2) Keith Taylor	(5%);
(3) Martin Leffler	(2.5%);
(4) Michael Miller	(2%); and
(5) Jerome Ward	(0.5%)[2]

NXA's Operating Agreement provided that the company would be managed by Keith Taylor and Martin Leffler, but that members holding at least 66 2/3 interest in the company (meaning the Katz Family Trust exclusively) could remove a manager, and could appoint a new manager in the event of a vacancy in the position of manager.

NXA's members executed NXA's Operating Agreement on July 19, 2005. On that same date, Keith Taylor and Martin Leffler, in their capacities as trustees of the Katz Family Trust, and in their capacities as NXA's managing members, signed an agreement which provided that, as managers of NXA, they would obtain prior approval from Oscar Katz "with respect to significant [NXA] decisions, including but not limited to . . . loan, construction and other significant [NXA] contracts, and admission of new members to [NXA]." Keith Taylor and Martin Leffler also signed a second agreement which provided that, as trustees of the Katz Family Trust, they would obtain prior approval from

---

[2] As noted above, Miller and Ward are accountants, and were associated with Leffler in a professional accounting corporation, LMW, and were admitted as members of NXA "at least in part to - as a vehicle for the payment of . . . the [accounting] fees [that] Katz owed to [the firm.]" To the extent the Jacksons may have pressed any claims against Miller, Ward, or LMW, the record suggests the Jacksons have settled those claims, and neither Miller, nor Ward, nor LMW are involved to the consolidated appeals addressed in this opinion.

Oscar Katz with respect to significant Trust decisions. In a third agreement signed on the same date, Keith Taylor and Martin Leffler agreed that Oscar Katz had the right to amend the operating agreement to reduce the percentage interest of "[Keith] Taylor, individually, and/or [Martin Leffler, Michael Miller, and Jerome Ward], in the aggregate, to as little as 3%."

In the briefs filed for the current consolidated appeals, the parties refer to the three agreements described in the previous paragraph as the "side agreements," and we will use the same nomenclature. So, on July 19, 2005, Oscar Katz, by and through the Katz Family Trust, and Keith Taylor, Martin Leffler, Michael Miller, and Jerome Ward, created an LLC that was to be known as NXA. On the face of its Operating Agreement, it was to be managed by Keith Taylor and Martin Leffler, but in accord with the side agreements, was in reality under the near complete control of Oscar Katz.

The End History of the Property Dealings

On September 1, 2005, with 88 Palos Verdes on one side of the transaction, and NXA (identified as the "'New Buyer'") and NewXarts (identified as the "'Old Buyer'") on the other side of the transaction, the three parties entered into an Eleventh Amendment to the FAPSA for the Redondo Beach property (the "11th Amendment"). The stated purchase price for the property under the terms of the 11th Amendment had grown to $25 million. The 11th Amendment acknowledged that $1.080 million had already been deposited into a nonrefundable escrow, and called for NXA to deposit an additional $1 million into the nonrefundable escrow by October 14, 2005, in order to extend the closing date of the sale to December 15, 2005.

The Jacksons' Investment

At about the same time that 88 Palos Verdes and NXA were coming to terms for the 11th Amendment for the Redondo Beach property, the members of NXA were coming to the belief that 88 Palos Verdes might begin demanding as much as $1 million for each additional 30-day extension of the closing date for the sale, and they began looking for ways to finance any such extensions of the escrow's closing date. It was in this context and time frame, that the Jacksons came back into the picture. Starting sometime around late summer 2005, Keith Taylor began talking to Ralph Jackson again about investing in NXA's Redondo Beach venture. Taylor kept Martin Leffler apprised of those discussions.

On August 31, 2005, NXA sent a letter, signed by Martin Leffler, as co-managing member, to the Jacksons to confirm earlier conversations regarding their investment in the venture involving the Redondo Beach property. The letter indicated that NXA would agree to grant the Jacksons a 5 percent interest in the company in consideration of their investment of $200,000, and would immediately sign a letter of intent pursuing a sale (or more accurately a resale) of the property to American Realty Advisors should NXA be successful in its acquisition of the property. The letter further indicated that, if the property was not sold to American Realty Advisors, then NXA agreed to immediately sell the property to another third-party for $30 million or more.

In an internal memorandum to NXA's members in mid-September 2005, Keith Taylor detailed his most recent discussion with Jackson as follows: "We have a commitment from Ralph Jackson [for] $200,000 predicated on a 5% share of [NXA] and the immediate sale of the project to American Realty Advisors for $30 million . . . . [T]his would result in about $5 million in proceeds . . . . [¶] Jackson possibly will contribute up to $1 million . . . , however, his funds will be tied to an immediate [re]sale without development."

Discussions between Taylor and Jackson continued into October 2005. During the course of their discussions, Taylor persuaded Jackson to invest $1 million to allow NXA to extend the escrow for the Redondo Beach property. He represented that it would be a safe investment because NXA was close to financing its purchase, and would probably have the money very soon to close the sale. Jackson agreed to make the investment because he believed in Taylor, who had been Jackson's friend and financial consultant for 15 years.

On October 6, 2005, NXA, by Keith Taylor, signed a listing agreement granting the real estate brokerage firm of Grubb & Ellis the exclusive right to negotiate the sale, or again more accurately, the resale, of the Redondo Beach property.[3]

On October 12, 2005, i.e., two days before NXA was required under the terms of 11th Amendment to the FAPSA for the Redondo Beach property to deposit an additional $1 million into escrow to extend the closing date, Keith Taylor provided Ralph Jackson with a draft of a written investment agreement between NXA and Jackson.[4] Although Jackson had already largely decided that he would make the investment, he advised Keith Taylor that he first wanted to change some terms in the draft of the investment agreement so that it included provisions that NXA would resell the property at $26 million if necessary, and specifically noting that Jacksons' profit would be $400,000. Further, that Ralph Jackson would have the same power to sell the property from NXA as Taylor. Taylor had told the Jacksons that he had the power from NXA to sell the property.

On October 13, 2005, NXA, by its managing members, Keith Taylor and Martin Leffler, and Ralph Jackson executed an agreement which included the terms set forth in the draft version summarized above, with the additional modifications proffered by Jackson. We will refer to this final, executed document as the "Investment Agreement." The Investment Agreement's recitals included statements to the effect that NXA had the right to purchase the Redondo Beach property, and that Ralph Jackson was an investor who was "experienced and sophisticated in real estate matters." A copy of the 11th Amendment to the FAPSA between NXA and 88 Palos Verdes, showing that NXA had agreed to pay $25 million for the property, was attached to the Investment Agreement as an exhibit. The Investment Agreement included the following provisions:

---

[3] The Jacksons' son, Chris Jackson, worked as a commercial real estate broker at the Grubb firm. So, in the event NXA acquired the Redondo property, and turned around and promptly resold it, the Jacksons' son stood to earn a commission on the resale.

[4] The draft of the written agreement had been prepared by attorney Hackman sometime around October 8, 2005. Hackman prepared the draft of the agreement based upon information and an outline of terms which were provided to him by Keith Taylor.

“**1.** **Payment of Deposit.** Mr. Jackson will pay on or before October 12, 2005 the sum of [$1 million] . . . to Commerce Escrow as directed by [NXA], as the Deposit in [NXA]’s Escrow to purchase the Property. Mr. Jackson acknowledges that the Deposit will be forfeitable if [NXA] or an outside purchaser does not purchase the Property on a timely basis.

“**2.** **[NXA] Alternatives**.

“(A) [NXA] desires to attempt to establish a Joint Venture to purchase the Property, or to obtain capital to enable [NXA] to purchase the Property itself. [NXA] shall have up to and including November 14, 2005 to close the purchase of the Property in such manner. Any such purchaser shall be referred to as a “[NXA] Purchaser”.

“(B) If [NXA] does not close the purchase of the Property on or before November 14, 2005, or earlier at [NXA]’s option, [NXA] agrees to immediately list the Property with Chris Jackson at Grubb and Ellis, to enable the [NXA] to ‘double escrow’ the purchase of the Property on or before December 15, 2005, so long as Grubb and Ellis agrees to limit its commission to two percent (2%) of the purchase price. [NXA] agrees to accept a purchase price of no less than [$26 million]. Any such purchaser shall be referred to as an ‘Outside Purchaser’.

“(C) [NXA] has been informed that Chris Jackson is Mr. Jackson’s son.

“(D) [NXA] agrees to execute all documents required to establish and close the double escrow on a sale to an Outside Purchaser which qualifies under subparagraph (B) above.

“(E) Payment of the [$1 million] will entitle Ralph and Jane Jackson to a forty percent (40%) equity in [NXA].

“(F) Ralph and Jane Jackson shall share the same power in [NXA’s Operating] agreement dated July 1, 2005 as to the sale of the property as does Keith Taylor.

“(H) Ralph and Jane Jackson shall have the first right of profit distribution in the event of the sale of the property.

“**3.** **<u>Right of First Refusal.</u>** If an Outside Purchaser executes an Agreement to purchase the Property, a [NXA] Purchaser shall have a right of first refusal to purchase the Property for the purchase price agreed to with the Outside Purchaser, which purchase must be completed on or before December 9, 2005.

“**4.** **<u>Rights of Mr. Jackson at Closing</u>**.

“(A) Upon the Purchase of the Property, regardless of the purchaser or the form of the Property, Mr. Jackson shall be entitled to return of the [$1 million], plus an additional [$400,000], or forty percent (40%) of the [NXA]’s profits, whichever is greater, payable by the [NXA] Purchaser if it purchases the Property, and out of the [NXA]’s proceeds if an Outside Purchaser purchases the Property.

“(B) If a [NXA] Purchaser purchases the Property, Mr. Jackson shall have the right, in lieu of receipt of the [$400,000], to be deemed to be an investor in the [NXA] Purchaser, entitled to a profit share equal to forty percent (40%) of the share held by the present investors in [NXA] and their affiliates. For example, if [NXA] is the purchaser because a sixty percent (60%) interest in [NXA] is purchased by investors contributing capital, then Mr. Jackson would be entitled to sixteen percent (16%) and the present investors would be entitled to twenty four (24%), or, if [NXA] enters into a Joint Venture so that it holds a forty percent (40%) interest in the Joint Venture, Mr. Jackson would be entitled to a forty percent (40%) interest in [NXA].

“**5.** **<u>Representations, Warranties and Acknowledgements.</u>** The parties make no representations, warranties and acknowledgements to each other, except as follows:

“(A) Each party represents to the other that the representing party has the right to enter into this Agreement, and that the consummation of the transactions contemplated by this Agreement will not result in a breach of any term or provision or constitute a default under any contract, agreement, instrument, understanding, judgment or decree to which the representing party is a party or by which such party is bound.

"(B) To the best knowledge of each of the parties, no approval, consent, authorization, order, rule, permit or regulation of any court or governmental agency or body is required for full performance of this Agreement.

"(C) Mr. Jackson has obtained such information about [NXA], the Property or the history of [NXA]'s attempts to purchase the Property that Mr. Jackson requires to make an informed decision to enter into this Agreement. . . .

[¶] . . .[¶]

"**8. Entire Agreement.** This Agreement and the Exhibits hereto contain the entire agreement between the parties and supersedes any other prior understandings and/or written or oral agreements between them respecting the within subject matter. There are no representations, agreements, arrangements or understandings, oral or written, between and among the parties hereto relating to the subject matter of the Agreement which are not fully expressed herein.

[¶] . . .[¶]

"**12. Representation.** The parties acknowledge that each party has been represented by counsel or had the opportunity to do so. This Agreement is not to be interpreted in favor of either party on the basis of who prepared this Agreement."

The Investment Agreement was executed on behalf of NXA by Taylor and Leffler, as managers of NXA, on the one side, and by Ralph Jackson on the other side.

After executing the Investment Agreement, Ralph Jackson delivered a check for $1 million to Keith Taylor. At about the same time that Taylor was hurrying to the escrow company with the Jacksons' check, Oscar Katz learned that NXA had signed an agreement with Ralph Jackson. Katz called attorney Hackman and asked, "What the hell did you write up?" Katz did not give his approval of the Investment Agreement before it was signed by Ralph Jackson and by NXA, through its managers, Taylor and Leffler. When Katz learned of the terms in the Investment Agreement, he indicated he did not like them and registered his objection to Taylor and Leffler.

After the Jacksons' Investment

NXA was unable to close escrow by the December 15, 2005, date prescribed in the 11th Amendment to the FAPSA with 88 Palos Verdes. The closing date was extended to February 15, 2006, under the terms of a "12th Amendment" to the FAPSA. This 12th Amendment to the FAPSA was by signed on behalf of NXA by Keith Taylor and Martin Leffler, as its managers. The 12th Amendment included a release of all potential claims against 88 Palos Verdes. Oscar Katz, and the Jacksons, signed and joined in the 12th Amendment, specifically citing the release of all claims against 88 Palos Verdes.

On January 10, 2006, Standard Pacific Homes, West Millennium Homes, and Maupin Development delivered a nonbinding letter of intent (LOI) to NXA — through Chris Jackson at Grubb & Ellis — offering to pay $26.1 million for an assignment of NXA's right to purchase the Redondo Beach property. By letter dated January 13, 2006, NXA, by Martin Leffler, rejected the LOI from Standard Pacific. On January 16, 2006, Brentwood Capital Partners (BCP) delivered an LOI to NXA — through Chris Jackson at Grubb & Ellis – offering to purchase NXA's position in escrow for the Redondo Beach Property for $26.1 million. BCP's letter of intent indicated that it could close in seven days, and that it was prepared to pay all cash. By letter dated January 24, 2006, NXA, by Martin Leffler, rejected the LOI from BCP.

Meanwhile, Oscar Katz had made contact with another developer whom he knew, Gerald Marcil, about a possible co-development deal. On January 20, 2006, Marcil, as president of Palos Verdes Investments, Inc., delivered a LOI to Katz to purchase the Redondo Beach property for $28.5 million through an LLC yet to be formed, and subject to a due diligence review. Sometime later, Marcil decided to withdraw from any involvement in a joint venture with NXA, and, in the end, NXA's FAPSA (in all of its amendment forms) with 88 Palos Verdes for the Redondo Beach property terminated, and the Jacksons' $1 million in the nonrefundable escrow was forfeited.[5]

---

[5] In late 2005 and into early 2006, while Leffler and Katz were pursuing alternatives, ostensibly in NXA's interests, Keith Taylor regularly voiced his view to

The Litigation — the Pleadings

In May 2006, the Jacksons filed a complaint for damages against NXA, Keith Taylor, Martin Leffler and Oscar Katz. In February 2007, the trial court granted the Jacksons's motion for leave to file a first amended complaint which added Leffler's accounting firm, Leffler, Miller & Ward (LMW) as a named defendant. In April 2007, the Jacksons filed a form amendment to the FAC, naming Michael Hackman as Doe 2. In July 2007, the Jacksons filed their operative second amended complaint (SAC).

The SAC alleges the following causes of action relevant to this appeal:

1. Breach of Contract against Leffler;
2. Breach of the Covenant of Good Faith and Fair Dealing against Leffler;
3. Fraud against Hackman and Leffler;
4. Negligent Misrepresentation against Hackman and Leffler;
6. Breach of Fiduciary Duties against Leffler;
8. Constructive Fraud against Leffler;
9. Fraud Based on Concealment of Material Facts against Hackman and Leffler;
12. Violation of Corporations Code Section 25401 against Hackman and Leffler;
13. Violations of the Securities Act of 1933 against Leffler;
15. Intentional Interference with Contractual Relations against Hackman and Leffler;
16. Intentional Interference with Prospective Economic Advantage against Hackman and Leffler; and
17. Negligent Interference with Prospective Economic Advantage against

---

them that NXA should accept the offers from Standard Pacific and/or BCP, and that the failure to do so created a likelihood of litigation from Jackson for breaching the Investment Agreement. It goes without saying that Leffler and Katz did not accede to the pleas made by Taylor.

Hackman and Leffler.[6]

In sum, the SAC alleges that Ralph Jackson should have been told that (1) Oscar Katz effectively controlled NXA as a result of the side agreements which required Keith Taylor and Martin Leffler, as NXA's managers, to obtain Katz's approval for any significant management decisions; and that (2) Katz never intended to resell the Redondo Beach property, but rather, always intended to pursue a development project on the site. The Jacksons' fundamental theory of liability is that they would not have agreed to invest their $1 million had they known these facts. The Jacksons' related claims all touch on the fundamental theory that they would not have gone into the deal had they known what was actually occurring behind the scenes, and had they known that there was not realistic possibility that the Redondo Beach property would be resold in a short period of time. Ancillary to their fundamental claim that they should never have been involved in the first place, the Jacksons allege that, once in, they would have been spared their lost investment had NXA sold — for the $26 million offered — its interests in purchasing the Redondo Beach property to a third-party when the opportunity arose.[7]

---

[6] The Jacksons' SAC also included a 10th cause of action against Leffler and Hackman alleging a common count for "money had and received," an 11th cause of action against Leffler and Hackman alleging a violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), and an 18th cause of action against Hackman, alone, alleging a claim for "legal malpractice." As near as we are able to discern after combing through the Jacksons' 95-page opening brief on appeal, they do not challenge summary resolution of those causes of action, and we consider those causes of action to have been abandoned. We do not consider any of the Jacksons' causes of action alleged against NXA or Oscar Katz or Keith Taylor.

[7] We are informed that Grubb & Ellis has filed a separate action against NXA, making a claim that it lost out on a payable commission when NXA did not sell the Redondo Beach property to Standard Pacific or BCP (*Grubb & Ellis v. nXa LLC* (Super.Ct. L.A. County, No. LC073811)), but see no relevance in that related case to the issues presented in the current consolidated appeals.

The Litigation — the Motions for Summary Judgment

On March 3, 2008, defendant Hackman filed a motion for summary judgment or, in the alternative, summary adjudication of each of the causes of action in which he was a named defendant. Hackman's motion largely rested on his evidence and argument that he had no attorney-client relationship with the Jacksons, and had made no representations to them at any time.

On May 30, 2008, the trial court entered a minute order granting summary adjudication of all of the Jacksons' causes of action against Hackman in his favor, and granting his motion for summary judgment. On June 19, 2008, the trial court entered summary judgment in favor of Hackman.

On June 17, 2008, defendant Leffler filed a motion for summary judgment or, in the alternative, summary adjudication of each of the causes of action in which he was a named defendant. Leffler's motion rested on evidence and the argument that he had no special relationship with the Jacksons, that he was no more than a member of NXA and a signator of the Investment Agreement in his role as NXA's managing member, that he had made no representations to the Jacksons at any time, and that he had no fiduciary duties to the Jacksons.

On September 4, 2008, the trial court entered a minute order granting summary adjudication of all of the Jacksons' causes of action against Leffler in his favor, and granting his motion for summary judgment. On November 21, 2008, the court entered summary judgment in favor of Leffler.

The Jacksons filed timely separate notices of appeal from the separate judgments entered in favor of Hackman and Leffler. The Jacksons subsequently filed a motion in our court to consolidate the two appeals, which we granted.

DISCUSSION

I. The First and Second Causes of Action for Breach of Contract and Breach of the Covenant of Fair Dealing Against Leffler

The Investment Agreement signed by Ralph Jackson was explicitly formulated as a contract between NXA and Ralph Jackson, giving potential rise to an award of damages *against NXA*, upon proof of a breach of contract *on the part of NXA*. The trial court ruled that Leffler had no liability on the Jacksons' contract-related causes of action because he was not a contracting party, and could not otherwise be held liable for NXA's breach on an "alter ego" theory.[8] On appeal, the Jacksons contend summary judgment in favor of Leffler must be reversed because triable issues of fact exist regarding his liability on their first cause of action for breach of contract, and second cause of action for breach of the covenant of good faith and fair dealing as NXA's alter ego. We agree.

A. Limited Liability Companies and Alter-ego Principles

Limited liability companies in California are governed under the Beverly-Killea Limited Liability Company Act. (Corp. Code, § 17000 et seq.) Similar to corporations, two fundamental characteristics are ascribed to a limited liability company such as NXA. First, an LLC is recognized as an independently existing legal entity, apart from its officers and members, with the powers, among others, to enter contracts, and to buy, own and sell real and personal property, and incur debts, and sue or be sued. (See, e.g., *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212 (*Pacific Landmark*); and see Corp. Code, § 17003.) Second, the members of an LLC are generally insulated from liability beyond the value of their contributions to the LLC, providing the requisite formalities are satisfied. (*Pacific Landmark*, *supra*, 129 Cal.App.4th at p. 1212.) The privilege against personal liability is not, however, absolute, and the members of an LLC "are subject to liability under the same

---

[8] Hackman is not named in the Jacksons' contract-related causes of action.

circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability." (*Ibid*.; see also Corp. Code, § 17101, subd. (b).)

The imposition of alter ego liability on an individual who does business through a corporation is an equitable remedy, and, as such, the decision whether to impose alter ego liability is an issue assigned to the trial court, with no right to a jury determination on the alter ego question. (See *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 147-148.) And, because our legal system recognizes the benefits of allowing persons to limit their business risks through incorporation, sound public policy dictates that a trial court must approach the imposition of alter ego liability "with caution." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.) For this reason, two overriding predicates are required before a trial court may impose alter ego liability on an individual who does business through a corporation: (1) there must be such a unity of interests and ownership that the separate personalities of the corporation and individual no longer exist; and (2) if the acts involved in a plaintiff's case are treated as those of the corporation alone, an inequitable result will follow. (*Ibid*.) A trial court's determination whether to ignore the corporate veil is primarily a question of fact. (*Id*. at p. 1248.)

Various factors are relevant in a court's determination whether the separation of a corporation and individual has ceased to exist, including: the commingling of funds and other assets, the failure to separate the assets of the individual and the corporation, the treatment of corporate assets as those of an individual, representations that the individual will be personally liable for corporate debts, the failure to maintain separate records or the commingling of the records of the individual and the corporation, the use of the same business location or same employees, the use of the corporation as a mere shell for the conduct of the affairs of the individual, the failure to maintain arm's length transactions between the individual and corporation, and the diversion of assets. (See, e.g., *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 343; *Associated Vendors, Inc. v. Oakland Meat Co*. (1962) 210 Cal.App.2d 825, 838-840.)

"Another factor to be considered in determining whether individuals [operating] through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation. . . . 'If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.' " (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796-797.)

No one factor is dispositive, and a trial court must look at all of the circumstances in determining whether, as a matter of equity, alter ego liability should be imposed. (See, e.g., *Baize v. Eastridge Companies, LLC* (2006) 142 Cal.App.4th 293, 302; and see also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539.) In the final analysis, "'once shorn of verbiage about control, instrumentality, agency, and corporate entity, [alter ego] liability is imposed to reach an equitable result.'" (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 301.)[9]

B. Analysis

Leffler supported his motion for summary judgment with a declaration in which he testified to the following facts: he was a managing member of NXA, but, at no time, had he received any salary or any other type of compensation from NXA. He never used any asset of NXA, never took any money out of NXA, and never commingled any of his own assets with NXA's assets. NXA never owed him any money personally, although it owed his accounting firm significant unpaid accounting fees. According to Leffler, he never personally met or talked to Ralph Jackson until after the Jacksons filed their lawsuit, and

---

[9] Leffler correctly notes in his respondent's brief that, because the imposition of alter ego liability is an equitable remedy, the issue of alter ego identity between a corporation and an individual is an issue for the court, with no right to a jury trial on an alter ego claim. (See *Dow Jones Co. v. Avenel, supra,* 151 Cal.App.3d at pp. 147-148.) The principle that alter ego claims are adjudicated by court trial, however, is not relevant to the Jacksons' appeal, which asks whether there are disputed facts which require a trial. In other words, if there are disputed facts regarding the alter-ego issue, summary judgment is not proper, and those facts will need to be tried to the trial court, after a resolution of the underlying, substantive contract-based claims against NXA.

did not learn that Ralph Jackson had agreed to provide NXA with the $1 million in funds needed for the escrow for the Redondo Beach property until Keith Taylor had told him that the deal was done, after the fact. Leffler asserted he never authorized Taylor to misrepresent any facts to Ralph Jackson. Thus, with regard to the Jacksons' contract-related causes of action, Leffler largely elected not to dispute whether NXA had breached the Investment Agreement signed by Ralph Jackson, but rather, took the position that, breach or no breach, he had no contract-based liability because he was not the contracting party, and not an alter-ego of the contracting party.

In their opposition to Leffler's motion for summary judgment, the Jacksons argued that Leffler could be held liable on their contract-related causes of action under an alter ego theory based on three fact-based factors: (1) NXA was never capitalized because no member of NXA, including Leffler, had invested any money in NXA; (2) NXA's members concealed that NXA was effectively managed by one person, namely Oscar Katz; and (3) NXA was a "'single purpose entity'" formed only to purchase and develop the Redondo Beach property, and, when that venture failed, the company would have been dissolved had it been something more than a "shell entity." That had not happened, further suggesting it continued to exist solely for the limitation of liability. The Jacksons largely restate the same arguments on appeal.

In his reply in the trial court, Leffler did not directly address whether or not there was disputed evidence underlying the Jacksons' argument that alter ego liability could be affixed to Leffler because NXA had been "undercapitalized." Instead, Leffler argued that the Jacksons were proffering facts and theories to defeat summary judgment which they had not disclosed in their answers to his contention interrogatories. Leffler argued for the trial court to bar the Jacksons from proffering this new material to defeat his summary judgment motion. Leffler cited *Barton v. Elexsys Internat., Inc*. (1998) 62 Cal.App.4th 1182, 1191-1192 in support of his forfeiture argument. At the time it ruled on Leffler's summary judgment motion, the trial court agreed with Leffler's argument, ruling that the Jacksons could not "contradict" their discovery responses.

On appeal, the Jacksons re-assert their argument that alter ego liability may be imposed on Leffler at the time of trial because there is substantial evidence that NXA had been undercapitalized. Leffler, for his part, again skirts the undercapitalization element, and renews his argument that the Jacksons' alter ego claims should be restricted by their responses to his discovery.

Although the record suggests to us that the Jacksons face a potentially Sisyphean task in establishing Leffler's alter ego liability at trial, we are satisfied that there is enough evidence in the record to justify a trial, and that the alter ego issue should not have been resolved adversely to the Jacksons in the context of a motion for summary judgment or summary adjudication. The Jacksons' claims — supported by substantial evidence — that NXA had been undercapitalized, and that its control and management had been consolidated in the hands of Oscar Katz, raise the possibility of a decision, by a court trial, which imposes alter ego liability on NXA's members. We decline to foreclose a trial in the particular circumstances extant in the summary judgment context presented in this case. We are sympathetic to Leffler's discovery-oriented position, but find the Jacksons' responses to Leffler's contention interrogatories are not so specific to have *excluded* their alter ego theory based on evidence showing that NXA was undercapitalized, and that the members had reposed all management power in one individual, Oscar Katz.

III. The Third and Fourth Causes of Action for Fraud and Negligent Misrepresentation Against Hackman and Leffler

The Jacksons contend both summary judgments must be reversed because sufficient evidence exists to support a trier of fact's finding that every element of their third cause of action against Leffler and Hackman for fraud, and fourth cause of action against Leffler and Hackman for negligent misrepresentation, was presented.
We disagree as to Hackman; we agree as to Leffler.

A. The Misrepresentation Element

The Jacksons' first challenge the trial court's finding that no triable issues of fact existed on the misrepresentation element of their third and fourth causes of action. According to the trial court, the Jacksons did not submit any evidence showing that either Hackman or Leffler made any misrepresentations to them. We see no error in the trial court's ruling. The Jacksons opening brief has failed to point us to any evidence in the record undermining the trial court's assessment. And, our review of the record establishes that it is an undisputed fact in this case that Leffler and Hackman never directly represented any facts to Ralph Jackson before he signed the Investment Agreement.

In an attempt to avoid the conclusion that neither Leffler nor Hackman made any direct misrepresentation to Ralph Jackson before he signed the Investment Agreement, the Jacksons argue that attorney Hackman penned a draft version of the Investment Agreement; and the final version of the Investment Agreement which was ultimately executed by NXA's managers and Ralph Jackson contained the same material terms as had been written into the draft version prepared by Hackman. Both the draft and final versions contained a myriad of misrepresentations and Hackman knowingly acted in concert with NXA's members — primarily Keith Taylor — to assure that the Investment Agreement's misrepresentations were delivered to Ralph Jackson before he agreed to invest his money. In other words, the Jacksons' position appears to rest on the proposition that misrepresentations in the Investment Agreement should be attributed to Hackman. Although the Jacksons' argument is silent as to Leffler, we presume the implication is the same.

The Jacksons' reply brief on appeal clarifies their position, by further explaining that they are relying on a "promise without intent to perform" theory. We understand the Jacksons' argument to mean the Investment Agreement was, in the eyes of all of the defendants, an amalgam of meaningless and empty promises, made to induce the Jacksons to part with their money.

As to defendant Martin Leffler, we are willing to accept the Jacksons' broad-based assertion that a jury could reasonably find that the Investment Agreement constituted one, big "misrepresentation" in that its promises were not real, and that it was intended to be no more than a tool which would extract money from the Jacksons. Although there is evidence supporting a finding that NXA, and its managers, considered the Investment Agreement to be a binding contract on NXA at the moment it was executed, we accept that the record contains evidence from which a reasonable trier of fact could infer otherwise. NXA's managers knew they were under pressure to secure $1 million to extend the escrow for the Redondo Beach property. The Investment Agreement directly conflicted with the terms of NXA's Operating Agreement, and, more significantly, with the side agreements cut by Taylor and Leffler. The Investment Agreement offered the possibility of Ralph Jackson becoming a 40 percent interest-holder in the company, where the Katz Family Trust was already a 90 percent interest-holder, and Oscar Katz did not give his approval for the Investment Agreement. A reasonable juror could infer that there were misrepresentations with regard to NXA's promise to the Jacksons in the Investment Agreement.

We believe, however, a different result is warranted with regard to defendant Michael Hackman. The Jacksons' misrepresentation arguments are not supported by any meaningful cites to the evidence in the record showing his involvement in the presentation of the Investment Agreement to Ralph Jackson as part of a fraudulent scheme to extract their money. What the evidence shows, at best, is that Keith Taylor went to attorney Hackman and said that NXA's managers had worked out a deal with Ralph Jackson to obtain $1 million. Taylor provided Hackman with an outline of the deal, and asked Hackman to prepare a written agreement. Hackman did so, and forwarded a draft to Taylor. The evidence shows he heard no more about the deal until after the final version of the Investment Agreement had been signed by NXA, through its managers, and Ralph Jackson. Apart from that, the Jacksons offer the evidentiary element that Hackman wanted his unpaid legal fees to be paid. We agree with Hackman, and with the trial court, that that no reasonable trier of fact could infer that Hackman was involved in a fraudulent scheme to induce the Jacksons to part with their money based on this evidence.

The Jacksons seem to consider their *assertions* on appeal to be sufficient to show the existence of a triable issue of fact regarding the misrepresentation element of their third and fourth causes of action against Hackman. We disagree. In the final analysis, the Jacksons' misrepresentation argument fails on appeal because Hackman did nothing other than draft an initial version of the Investment Agreement. This did not affirmatively induce Ralph Jackson to sign the Investment Agreement and invest the money. The Jacksons' arguments on appeal disclose no *evidence* to contradict this.

B. The Intent and Reliance Elements

For the reasons explained above as to defendant Martin Leffler, we are satisfied that the evidence in the record is sufficient to create triable issues of fact on the intent to induce reliance element of their third and fourth causes of action against Leffler, and the justifiable reliance element of those causes of action. A reasonable trier of fact could infer that Taylor and Leffer presented the Investment Agreement to Ralph Jackson with the intent to induce him to invest the $1 million. Indeed, that appears to have been the very purpose of the Investment Agreement. Leffler's argument that Ralph Jacksons' reliance was not justifiable rests on two factors — one, he warranted in the Investment Agreement that he been given an opportunity to consult with an attorney; and, two, he stated in this deposition that he relied on Keith Taylor, his "trusted financial advisor," in making the $1 million investment. We find these factors do not, as a matter of law, negate the possibility that a trier of fact could find justifiable reliance. This is particularly in the context of the Jacksons' claims, which rely, at least in part, on a promise without intent to perform theory.

Absent some factual indication that Jackson knew or should have known that the promises in the Investment Agreement had been given without any intent to perform, it may or may not be significant whether he consulted an attorney. At trial, Leffler may be able to persuade the trier of fact that, had Jackson actually consulted with an attorney, he would not have relied on the Investment Agreement. But, we are not persuaded that the summary procedure utilized in this case is the proper path to a judgment in Leffler's favor. Ralph Jacksons' reliance on Keith Taylor does not mean that Jackson could not have justifiably relied on the Investment Agreement in making his investment decision.

IV. The Sixth and Eighth Causes of Action for Breach of Fiduciary Duties and Constructive Fraud Against Leffler

The Jacksons's sixth and eighth causes of action against Leffler for breach of fiduciary duty and for constructive fraud, respectively, rest on an allegation that Leffler violated fiduciary duties owed to the Jacksons. The violative actions alleged are "causing NXA to reject no less than two offers [for the Redondo Beach property] in excess of $26 million," and failing to disclose material financial facts involving NXA and/or NXA's purchase of the Redondo Beach property. The trial court ruled that all of the Jacksons' claims related to an alleged breach of fiduciary duties, including their sixth and eighth causes of action, failed because Leffler owed no fiduciary duties to the Jacksons as a matter of law. The trial court determined Leffler owed no fiduciary duties to the Jacksons because the Jacksons were not members of NXA, and the Jacksons were not owed special duties as a result of their status as creditors of NXA. On appeal, the Jacksons argue summary judgment in favor of Leffler must be reversed because triable issues of fact exist on their claim that he owed fiduciary duties to them based on their status as creditors of NXA. We disagree.

None of the authorities cited by the Jacksons on appeal support their proposition that, because NXA was insolvent at all relevant times, its managing members owed broadly-applicable fiduciary duties to creditors like the Jacksons. On the contrary, the authorities cited by the Jacksons involve the so-called "trust fund doctrine" applicable in limited circumstances in the context of creditors of insolvent corporations. As the local bankruptcy court explained in *In re Jacks* (Bankr. C.D. Cal. 1999) 243 B.R. 385, a corporation's directors generally do not owe any fiduciary duties to its creditors under

California law. (*Id*. at p. 390.) At the moment a corporation becomes insolvent, however, the fiduciary duties which its directors owe to shareholders are extended to its creditors as the corporation's "residual stakeholders." (*Ibid*.) In other words, when a corporation passes into insolvency, its assets become recognized under California law as being held in a trust fund for the benefit of its creditors. (*Saracco Tank & Welding Co. v. Platz* (1944) 65 Cal.App.2d 306, 315.) The corporation's directors are thus precluded from transferring or using any of its assets for their personal benefit or for the benefit of preferred creditors. (See, e.g., *In re Jacks* (Bankr. 9th Cir. 2001) 266 B.R. 728, 736-738; *Commons v. Schine* (1973) 35 Cal.App.3d 141, 145.)

Any remaining doubt is removed by the Sixth District's recent discussion of the fiduciary duties owed by individual directors to creditors set out in *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020 (*Berg*). In *Berg*, just as in the Jacksons' current case, a creditor of an insolvent corporation sued its directors individually for breach of fiduciary duty. The trial court sustained the defendants' demurrer without leave to amend, and the ruling was affirmed on appeal. As our erudite colleagues in the Sixth District explained, there is no statutory authority in California recognizing that the directors of a corporation, upon its insolvency, or upon its entry into a "zone of insolvency," owe a duty to the corporation's creditors. (*Id*. at p. 1037.) To the extent directors are required to consider the interests of creditors in any manner at all, the duty implicates the concept of the "trust fund doctrine." (*Id*. at pp. 1038-1040.) In the Jacksons' current case, as in *Berg*, the trust fund doctrine does not support a cause of action.

A claim for breach the fiduciary duty under the trust fund doctrine exists when the directors or officers of an insolvent corporation have diverted the corporation's assets of the corporation for the benefit of insiders or preferred creditors. (*Berg, supra,* 178 Cal.App.4th at p. 1040.) While no California case has expressly limited the fiduciary duty under the trust fund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the cases do teach that the doctrine is not applied to create a duty owed by directors to creditors solely due to a state of corporate insolvency. (*Id*. at p. 1041.) Application of the doctrine requires, in addition, that directors have engaged in conduct that diverted, dissipated, or unduly risked corporate assets that might otherwise have been used to satisfy creditors' claims. (*Ibid*.)

Based on the established scope of the trust fund doctrine, we agree with the Sixth District that "there is no broad, paramount fiduciary duty of due care or loyalty that directors of an insolvent corporation owe the corporation's creditors solely because of a state of insolvency . . . . And we decline to create any such duty, which would conflict with and dilute the statutory and common law duties that directors already owe to shareholders and the corporation. We also perceive practical problems with creating such a duty, among them a director's ability to objectively and concretely determine when a state of insolvency actually exists such that his or her duties to creditors have been triggered. We accordingly hold that the scope of any extracontractual duty owed by corporate directors to the insolvent corporation's creditors is limited in California, consistently with the trust fund doctrine, *to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors claims.*" (*Berg, supra*, 178 Cal.App.4th at p. 1041.)

Assuming NXA was insolvent, the trust fund doctrine cases are inapplicable because the undisputed evidence in this case shows that nobody with any connection to NXA removed or paid out anything of any value from NXA's assets to the Jacksons' detriment as creditor's of the company. As Leffler aptly observes in his respondent's brief, "no-one was paid" when NXA's contract to purchase of the Redondo Beach property fell apart. Whatever merit there may be to the Jacksons' allegation that Ralph Jackson was duped into investing his money in NXA's attempted purchase of the Redondo Beach property, that claim does not encompass a claim based on a breach of fiduciary duties theory.

V. The Ninth Cause of Action for Fraud Based on Concealment Against Hackman and Leffler.

The Jacksons contend both summary judgments must be reversed because triable issues of fact exist on their ninth cause of action for fraud based on concealment of material facts against Leffler and Hackman. We disagree as to Hackman, we agree as to Leffler.

California law recognizes four circumstances in which a nondisclosure of fact may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes a partial representation, but suppresses additional facts which qualify his or her representation, and the suppressed facts render the representation actually made likely to mislead. (See, e.g., *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336; see also Civ. Code, § 1710, subd. (3).) The Jacksons argue that the trial court solely focused on the "fiduciary relationship" circumstance, and ignored their remaining evidence showing that Leffler and Hackman failed to disclose material facts — known to them, but not Ralph Jackson — about NXA and the purchase transaction for the Redondo Beach property.

The Jacksons' arguments are not persuasive as to NXA's attorney, Hackman, because their concealment claim is inherently and necessarily based on the proposition that where a lawyer represents a party who is on one side of a contract negotiation, that lawyer has a duty not only to his or her own client, but also has a duty to go around his or her client, and to disclose facts to the party who is on the side of the contract negotiation. The authorities cited by the Jacksons do not support such a proposition. For example, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282 (*Vega*), the defendant law firm filed a demurrer to a cause of action alleging that it had prepared a "disclosure schedule" to be delivered to the plaintiff in connection with a financing transaction. Before the firm delivered the schedule, the firm realized that the schedule might be a deal-breaker, so the firm hid the accurate schedule, and, instead, had supplied the plaintiff with a "sanitized version" of the schedule. (*Id*. at pp. 287-288, 290.) *Vega* is not, as the Jacksons say, "on all fours." The evidence in the record cited to us does not show that Hackman had been retained to prepare any disclosure documents to be delivered to the Jacksons, or more significantly, buried such disclosures.

We view Leffler's situation differently. We are satisfied that the Jacksons' opposition to Leffler's motion for summary judgment presented evidence which showed: (1) Leffler knew that the Jacksons were being solicited to invest in NXA; (2) Leffler knew about NXA's dealings for the Redondo Beach property; (3) Leffler knew that Oscar Katz had been essentially ceded full control over NXA's dealings for the Redondo Beach property; and (4) Leffler knew that Oscar Katz never intended to purchase and promptly resell the property, but rather, always envisioned a development project on the site. We are also satisfied that there is evidence in the record showing that, had the Jacksons been told of Katz's effective control of NXA, and been informed that there was no realistic intent to purchase and resale the Redondo Beach property, they would not have invested their $1 million. We express no view on the strength of the Jackson's claim for concealment of facts against Leffler, but we agree with their proposition their case is just not a case for summary judgment.

VI. The Twelfth Cause of Action for Violation of Corporations Code section 25401 Against Hackman and Leffler.

The Jacksons contend both summary judgments must be reversed because triable issues of fact exist regarding their twelfth cause of action against Leffler and Hackman for violating Corporations Code section 25401. We disagree.

Corporations Code section 25401 makes it unlawful to sell a security by making a materially false statement,[10] and Corporations Code section 25501 provides a private right of action for a violation of that section.

---

[10] Corporations Code section 25401 provides, in pertinent part: "It is unlawful for any person to offer or sell a security in this state . . . by means of any written or oral

The Jacksons's cause of action for violation of Corporations Code section 25401 overlays their causes of action based on misrepresentation. Although we are amenable to a claim for concealment against Leffler, we conclude the Jacksons simply cannot state a viable cause of action against either Hackman or Leffler in any event. As touched upon in the respondent's brief filed by Hackman, and as we recently explained in *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 252-253, liability for a violation of Corporations Code section 25401 only attaches to the "seller" of a security. Assuming the Investment Agreement involved in the Jacksons' current lawsuit meets the definition s of a "security,"[11] that security was sold by NXA, not by Leffler or Hackman, and they are not liable for any violation of the code. (*Ibid*. [Corporations Code section 25501, under which liability is implemented, "on its face requires privity between the plaintiff and the defendant"].)

VII. The Thirteenth Cause of Action for Violation of the Securities Act of 1933 Against Hackman and Leffler.

The Jacksons contend both summary judgments must be reversed because triable issues of fact exist regarding their thirteenth cause of action against Leffler and Hackman for violation of Section 12(a)(2) of the Securities Act of 1933 (hereafter Section 12(a)(2)). (See 15 U.S.C.A., § 77a et seq.) Our analysis of the Jacksons' claim for a

---

communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

[11] Corporations Code section 25019, defines a "security" as an "investment contract; . . . [or] interest in a limited liability company . . . , except a membership interest in a limited liability company in which the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; provided that evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company; . . . ."

violation of the federal securities law is similar to our analysis of their claim under the California Corporations Code. As a result, we find the Jacksons' argument unavailing.

Section 12(a)(2) provides any person who "offers or sells a security" in violation of the Securities Act "by the use of any means or instruments of . . . communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable . . . to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

A cause of action under Section 12(a)(2) exists only against a defendant who solicits the purchase of a security for his or her "own financial gain." (*In re Daou Systems, Inc.* (9th Cir. 2005) 411 F.3d 1006, 1029.) The $1 million paid by the Jacksons did not go to either Hackman or Leffler. In other words, Hackman and Leffler did not realize any "financial gain" from the Jacksons' investment in a "security." We agree with the trial court that this cause of action cannot stand.

VIII. The Fifteenth, Sixteenth, and Seventeenth Causes of Action for Intentional Interference with Contractual Relations and Prospective Economic Advantage and Negligent Interference with Prospective Economic Advantage Against Hackman and Leffler.

The Jacksons contends both summary judgments must be reversed because triable issues of fact exist against Leffler and Hackman regarding their fifteenth cause of action for intentional interference with contractual relations, their sixteenth cause of action for intentional interference with prospective business advantage, and their seventeenth cause of action for negligent interference with prospective economic advantage. Again, we disagree.

The common theme underpinning the allegations in the Jacksons' fifteenth, sixteenth, and seventeenth causes of action is the same. They allege Ralph Jackson and NXA entered into a binding contractual relationship by virtue of the Investment Agreement, and that Leffler and Hackman committed acts which prevented Jackson from realizing the benefits of the Investment Agreement. The trial court ruled in favor of Leffler and Hackman also based on a common theme — Leffler, as an agent for NXA, and Hackman, as the attorney for NXA, could not be liable for interfering with a contract made by their own principal, i.e., NXA.

The Jacksons maintain that Hackman can be held liable on their interference-based claims because he violated his "*own* duties to a third party," or in furtherance of his own interests. With regard to Leffler, the Jacksons argue that he can be held liable because he caused NXA to breach the Investment Agreement by refusing to accept the Standard Pacific and BCP offers, in favor of pursuing the Marcil joint venture. It appears the Jacksons' are arguing that NXA was required by the Investment Agreement to accept the Standard Pacific and BCP offers to purchase the Redondo Beach property. Further, that NXA is liable in contract for not accepting the offers and also that the managers of NXA may be held personally liable because they caused NXA to breach its contractual obligations as part of a design to sell the property for a higher price (which they wanted because it would assure payment of their underlying fees).[12]

We find the Jacksons' arguments as to Hackman unpersuasive because they have not shown us what duties that he owed to any third-party, not his client. While we agree that an attorney is not immunized from liability for his or her own wrongdoing against anyone, there must be some basis for obligating an attorney to act, or refrain from acting,

---

[12] Elsewhere in appellants opening brief, the Jacksons seem to suggest that the Investment Agreement gave Ralph Jackson the right to take control of the purchase of the Redondo Beach into his own hands. The ultimate claim, however, is the same — the managers of NXA "caused" NXA not to perform its obligations.

in a given circumstances. The problem we have in accepting the Jacksons' argument for potential liability against Hackman is that we do not understand what it is that he lawfully should have done, or not have done, on behalf of the Jacksons. We simply do not see any legal significance in Jacksons' assertion that Hackman had his own interests in mind in the 2005-2006 timeframe. We accept that Hackman wanted the NXA venture to be successful because its success would presumably result in profits, meaning it would have money to pay his legal fees. However, that does not translate into interference on the part of Hackman with the Investment Agreement made by his client.

Neither are we persuaded by the Jacksons' arguments against Leffler. NXA was a business entity and necessarily functioned through its managers. Even assuming that NXA, acting through Leffler, breached the Investment Agreement with Ralph Jackson, Leffler is not personally liable. The Jacksons' case is a model for application of the so-called "agent immunity rule." (See, e.g., *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) The Jacksons' arguments against application of this rule fail because those arguments again rely on the principle that an agent, here Leffler, has personal liability when he violates duties to a third party. However, the Jacksons have not adequately explained to us the nature of Leffler's duties to the Jacksons, upon which interference claims may be established. We have not read anything persuasive in the Jacksons' arguments which convince us that Leffler, as a manager of NXA, took on personal liability when he "caused" NXA to breach a contract which the company had entered.

IX. Conspiracy to Defraud Against Hackman and Leffler

The Jacksons contend (see Argument No. 7) both summary judgments must be reversed because triable issues of fact exist regarding their claim that liability may attach to Hackman and Leffler at trial based on a conspiracy to defraud theory. The Jacksons argue that any liability for fraud actually perpetrated by NXA and/or Keith Taylor may also be attached to Hackman and Leffler because they conspired with the actual wrongdoers to accomplish the fraud. We need not address this argument with regard to Leffler because, for the reasons explained above, we find there exists disputed evidence of his involvement in fraud by concealment of facts. We are not persuaded, however, by the Jacksons' argument to reverse summary judgment in favor of Hackman.

Civil conspiracy is a legal doctrine that imposes liability on persons who do not actually commit a tort themselves, but "*share with the immediate tortfeasors a common plan or design in its perpetration*." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510-511, emphasis added.) To be liable under the civil conspiracy doctrine, a conspiring defendant must have knowledge that a tort is planned, agree to the tortious scheme with knowledge of its purpose, and aid in its commission by conduct in furtherance of the conspiracy. (See, e.g., *Kidron v. Movie Acquisition Corp*. (1995) 40 Cal.App.4th 1571, 1581-1582.) And because a conspiracy is rarely susceptible to proof by direct evidence, its existence may be inferred from the nature of the acts committed by the alleged conspirators, the relationships between the alleged conspirators and between the alleged conspirators and the wronged party, the interests of the alleged conspirators, and any other relevant circumstances. (*Chicago Title Ins. Co. v. Great Western Financial Corp*. (1968) 69 Cal.2d 305, 316.)

The Jacksons argue they presented sufficient evidence to support "the inference that Hackman and Leffler were working in concert with Taylor and NXA to defraud the Jacksons into investing $1 million with NXA so that that [Hackman and Leffler] would keep alive their own ability to get paid." There is also an assertion, not truly applicable in the context of a fraudulent inducement claim, that "the actions undertaken to prevent the [Investment] Agreement from being fulfilled [were done] because a sale at the floor set forth in the [Investment] Agreement was too low as it would allow the Jacksons to be repaid the money they invested but would not allow Hackman or Leffler to be paid."

The Jacksons' argument for conspirator's liability against Hackman rests entirely on evidence suggesting that he hoped the Redondo Beach venture would succeed because its success would have made it more likely that NXA would pay Hackman's legal fees in the end. This evidence does not justify a trial because there is no real dispute that Hackman hoped to be paid, and because the undisputed evidence would not support a finding of conspirator's liability. Although it is true that a cause of action may be stated against attorney for conspiring with a client to defraud another person (see, e.g., *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39), liability may be found on such a claim only where the evidence showing that the attorney intend to achieve a financial gain beyond his or her professional fees earned as compensation for performing legal services. (*Berg & Berg Enterprises, LLC. v. Sherwood Partners, Inc*. (2005) 131 Cal.App.4th 802, 834.) The reason for this rule is fairly easy to understand, and is exemplified by the Jacksons' current case — absent some special financial gain by an attorney, a claim for conspirator's liability against an attorney could be made every time a defendant had been represented by counsel in the course of the events underlying a lawsuit for damages. We agree it is not a good idea for lawyers to be exposed to liability every time they work, and merely because they provide legal services to a client in connection with a business venture, and hope to be paid for those services out of the successes of the client's business.

X. Ratification as to Leffler

The Jacksons contend (Argument No. 8) summary judgment in favor of Leffler must be reversed because triable issues of fact exist regarding their claim that he ratified the fraud actually perpetrated by NXA, Oscar Katz, and Keith Taylor. Again, because we have determined that the Jacksons may pursue their fraud and concealment claims against Leffler, we need not resolve their "ratification" argument. It will all be part and parcel of the evidence at trial.

XI. Aiding and Abetting as to Hackman and Leffler

The Jacksons contend (see Argument No. 9) both summary judgments must be reversed because triable issues of fact exist regarding their claim that Hackman and Leffler aided and abetted the fraud and/or concealment actually perpetrated by NXA and Keith Taylor. For the reasons explained above, we disagree as to Hackman. As for Leffler, we again see little reason to expand on our conclusion that he may be held to answer the Jacksons' claim for damages based on fraud and concealment claims.

XII. Conspiracy Liability for Interference Against Hackman and Leffler

The Jacksons contend both summary judgments must be reversed because triable issues of fact exist regarding their claim that Hackman and Leffler conspired with Katz to interfere with the Investment Agreement between NXA and Ralph Jackson, and that they conspired with Katz to interfere with NXA's prospective relationship with third-party developers, Brentwood Capital Partners and Standard Pacific Corporation. We disagree.

The Jacksons' conspiracy arguments against Hackman are no more viable in the context of their interference causes of action than they were in the context of their fraudulent concealment cause of action. Absent some evidence showing that Hackman intend to achieve a financial gain above and beyond his legal fees, he cannot be held liable as a co-conspirator with his client.

The Jacksons' argument also fails to persuade us that Leffler may be held liable for conspiring to interfere with the Investment Agreement between NXA and Ralph Jackson. As we explained above, the Jacksons' arguments do not persuade that Leffler may be held liable for interfering with the Investment Agreement. Their addition of a conspiracy theory does not persuade us to change our conclusion. Again, the Jacksons argue that an exception to the "agent immunity rule" should be found. The argument is undeveloped and does not convince us that Leffler, as a managing manger of NXA, could have conspired to interfere with an agreement which he would by necessity implement or breach by his own actions as a manager of the company.

XII. Aiding And Abetting Liability For Interference

The Jacksons contend both summary judgments must be reversed because triable issues of fact exist regarding their claim that Hackman and Leffler aided and abetted in Katz's interference with the Investment Agreement between NXA and Ralph Jackson. The final 11 type spaces of the Jacksons' argument read: "[EVIDENCE?]" We could not say it better.

DISPOSITION

The judgment in favor of Michael Hackman, and Lewitt, Hackman, Shapiro, Marshall & Harlan, entered on June 19, 2008, is affirmed. The judgment in favor of Martin Leffler, entered on November 21, 2008, is reversed. The cause is remanded with directions to the trial court vacate its order granting Martin Leffler's motion for summary judgment (September 4, 2008), and to enter a new and different order denying the motion for summary judgment, and granting summary adjudication of issues in favor of Leffler on the Jacksons' 6th, 8th, 12th, 13th, 15th, 16th, and 17th causes of action, and to set the Jacksons' 1st, 2nd, 3rd, 4th and 9th causes of action against Leffler on track for trial. The parties are to bear their own costs on appeal, except Hackman shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, P. J.

We concur:

RUBIN, J.

LICHTMAN, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.